TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 895.

CHARLES E. WISWALL, CHARLES G. NAZRO, AND JOHN Q. THOMPSON, PLAINTIFFS IN ERROR,

vs.

GEORGE W. CAMPBELL AND LAWRENCE PROUDFOOT, ASSIGNEES OF THE ESTATE OF AUGUSTUS A. WISWALL, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1876.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY, *Clerk.*

CHARLES E. WISWALL, CHARLES G. NAZRO, and JOHN Q. THOMPSON
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDFOOT, assignees of AUGUSTUS A. WISWALL, bankrupt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 7th day of April, A. D. 1875, came said plaintiffs, by Messrs. McClellan and Hodges, their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, their bond for costs and declaration in said entitled cause, to-
2 gether with a transcript of a record from the district court of the United States for the northern district of Illinois, in the matter of Augustus A. Wiswall, bankrupt, which said bond for costs, declaration, and transcript of record are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court term, A. D. 1875.

CHARLES E. WISWALL, CHARLES G. NAZRO, and JOHN Q. THOMPSON
vs.
GEORGE W. CAMPBELL, LAWRENCE PROUDFOOT. } In

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them. Dated this seventh day of April, A. D. 1875.

McCLELLAN AND HODGES.

(Endorsed:) Filed April 7th, A. D. 1875. Wm. H. Bradley, clerk.

Declaration.

In the circuit court of the United for the seventh circuit and the
3 northern district of Illinois, ss., term, A. D. 1875.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDFOOT, assignees of Augustus A. Wiswall, bankrupt.

And the said Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, plaintiffs in this suit, having entered their appeal in this court from the decision of the district court of the United States for said district, wholly rejecting their claim against the estate of Augustus A. Wiswall, a bankrupt, by the adjudication and decree of the said district court, by McClellan and Hodges, their attorneys, complain of George W. Campbell and Lawrence Proudfoot, who are the assignees in bankruptcy of the estate and effects of said bankrupt, defendants in this suit; and thereupon the said Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson make the following statement of their claims aforesaid against the estate of said bankrupt, and against the said defendants, as the assignees thereof, as aforesaid:

For that whereas the said bankrupt, before he was adjudged such bankrupt, to wit, on the first day of December, A. D. 1872, at
4 the district aforesaid, became and was indebted to the said Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, the said plaintiffs, in a large sum of money, to wit, in the sum of sixteen thousand four hundred and sixty-nine dollars and fifty-eight cents, lawful money, for divers goods, wares, and merchandise before that time sold and delivered by the plaintiffs to the said Augustus A. Wiswall, the said bankrupt, and at his special interest and request, and being so indebted, the said bankrupt, before the adjudication of bankruptcy against him aforesaid, in consideration thereof, afterwards, to wit, on the year and day aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the plaintiffs, well and truly to pay the said plaintiffs the said sum of money last mentioned when he the said Augustus A. Wiswall should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special interest and request of said bankrupt, before he was adjudged such bankrupt, sold and delivered to him divers other goods, wares, and merchandise of the said plaintiffs, and the said bankrupt, before he was adjudged such bankrupt, then and there undertook, and faithfully promised the said plaintiffs that the said bankrupt would well and truly pay
5 to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said bankrupt should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further large sum of

sixteen thousand four hundred and sixty-nine dollars and fifty-eight cents, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said bankrupt afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said bankrupt, before he was adjudged such bankrupt, afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiffs in the further large sum of money, to wit, the sum of sixteen thousand four hundred and sixty-nine dollars and fifty-eight cents of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said bankrupt, and at the like request of the said bankrupt, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said bankrupt, and for other money by the said bankrupt before that time had and received, to and for the use of the said plaintiffs, and for other money before that time and then due
6 and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said bankrupt to said plaintiffs, and being so indebted, the said bankrupt, before he was adjudged such bankrupt, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned, when the said bankrupt should be thereunto afterwards requested.

And whereas, also, the said bankrupt afterwards, to wit, on the same day and year, and at the place aforesaid, and before he was adjudged such bankrupt, accounted with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said bankrupt to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said bankrupt then and there was found to be in arrear and indebted to the said plaintiffs in the further large sum of money, to wit, the sum of sixteen thousand four hundred and sixty-nine dollars and fifty-eight cents of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said bankrupt, before he was adjudged such bank-
7 rupt, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay to the plaintiffs the said sum of money last mentioned, when the said bankrupt should be thereunto afterwards requested.

And the plaintiffs aver that their claim aforesaid was duly proved before one of the registers in bankruptcy of said district court as required by law, and that the deposition and proof of the same was delivered to said defendants, as such assignees, before the disallowance and rejection of the same aforesaid.

Nevertheless, neither the said bankrupt nor the said defendants (although often requested, etc.) have *not* yet paid the several said sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendants and said bankrupt have hitherto altogether refused and still do refuse, to the damage of the said plaintiffs of sixteen thousand four hundred and sixty-nine dollars and fifty-eight cents, and therefore the said plaintiffs bring suit, etc.

McCLELLAN AND HODGES,
Plaintiffs' Attys.

(Endorsed:) Filed April 7, 1875. Wm. H. Bradley, clk.

8 *Transcript from bankruptcy court.*

To the district court of the United States for the northern district of Illinois.

MONDAY, *March 29th*, A. D. 1875.

Present, the Hon. Henry W. Blodgett, judge.

IN THE MATTER OF AUGUSTUS A. WISWALL, bankrupt. } In bankruptcy.

And now on this day the matter of the claim of Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, creditors against the estate of said bankrupt, coming on for hearing and argument, and the said creditors, by McClellan and Hodges, their attorneys, and the assignees of said bankrupt, George W. Campbell and Lawrence Proudfoot, by Merriam and Alexander, their attorneys, also come, and the court having heard the evidence on the part of the creditors in support of said claim and on the part of the assignees in opposition thereto, and the arguments of counsel for the said parties respectively, doth, on motion of the said attorneys for said assignees, adjudge and decree that the said claim of the said Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson be, and the same is hereby, wholly disallowed and rejected as a claim against the estate of said bankrupt, and thereupon said creditors, by their attorneys, pray an appeal to the circuit court
9 of the United States for the northern district of Illinois, which is allowed upon their giving bond, with security to be approved by the court, in the penal sum of $500.

Know all men by these presents that we, Charles E. Wiswall and John Q. Thompson, of the city of Chicago, in the county of Cook and State of Illinois, as principals, and John J. McClellan, of the same place, as sureties, are held firmly bound unto Lawrence Proudfoot and George W. Campbell, assignees in bankruptcy of Augustus A. Wiswall, a bankrupt, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seal', and dated this 29th day of March, A. D. 1875.

The condition of the above obligation is such, that whereas the said Charles E. Wiswall and John Q. Thompson and Charles G. Nazro have proved a claim against the estate of the said bankrupt in the sum of sixteen thousand four hundred and sixty-nine and $\frac{58}{100}$ dollars, which claim has been wholly disallowed and rejected by the district court of the United States for the northern district of Illinois, in which court the said Augustus A. Wiswall was adjudged a bankrupt, and
10 the order and decision disallowing and rejecting said claim was duly entered in and by said district court at the March term thereof, in the year 1875, to wit, on the 29th day of March, in the same year, and the said Charles G. Nazro, Charles E. Wiswall, and John Q. Thompson have claimed an appeal and have appealed from the said decision of the district court aforesaid to the circuit court for the same district to reverse the decision and order of the district court aforesaid disallowing and rejecting said claim:

Now, therefore, the condition of this obligation is such, that if the above-named Charles G. Nazro, Charles E. Wiswall, and John Q. Thompson shall prosecute their said appeal to effect and answer all costs and

damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES E. WISWALL.
JOHN Q. THOMPSON.
JOHN J. McCLELLAN.

Signed and delivered in presence of—
LAWRENCE PROUDFOOT.

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Security satisfactory. Lawrence Proudfoot, as-
11 signee. Filed March 29, 1875. Wm. H. Bradley, clk.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF AUGUSTUS A. WISWALL, bankrupt. } In bankruptcy.

Take notice that Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson claim an appeal, and do appeal, from the decision of the district court of the United States for the northern district of Illinois, wholly disallowing and rejecting their claim against the estate of said bankrupt to the circuit court of the same district.

Dated March 29, 1875.

McCLELLAN AND HODGES,
Attys. for the said Charles E. Wiswall, Charles G. Nazro, John Q. Thompson, Creditors, &c.

To WM. H. BRADLEY, Esq.,
Clerk of said Court.

(Endorsed:) Filed March 29, 1875. Wm. H. Bradley, clk.

In the district court of the United States for the northern district of Illinois.

12 IN THE MATTER OF AUGUSTUS A. WISWALL, bankrupt. } In bankruptcy.

Take notice that Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson claim an appeal, and do appeal, from the decision of the district court of the United States for the northern district of Illinois, wholly disallowing and rejecting their claim against the estate of said bankrupt to the circuit court of the same district.

Dated April 1, 1875.

McCLELLAN AND HODGES,
Attys. for the said Charles G. Wiswall, Charles G. Nazro, and John Q. Thompson, Creditors, &c.

To MERRIAM AND ALEXANDER,
Attys. for Assignees, and
GEO. W. CAMPBELL, and LAWRENCE PROUDFOOT,
Assignees, &c.

We hereby accept service of above notice this 1st day of April, 1875.

MERRIAM AND ALEXANDER,
Attys. for Assignees.
GEO. W. CAMPBELL, *Assignee.*
LAWRENCE PROUDFOOT, *Assignee.*

(Endorsed:) Filed April 7, 1'75. Wm. H. Bradley, clk.

13 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order entered of record in said court on the twenty-ninth day of March, A. D. 1875, disallowing the claim of Charles E. Wiswall, Charles G. Nazro, and John A. Thompson against the estate of A. A. Wiswall, bankrupt, and of the appeal-bond and notice of appeal filed by said creditors on their appeal from said order in bankruptcy, as appears from the records now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this seventh day of April, A. D. 1875.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Filed April 7, 1875. Wm. H. Bradley, clk.

Afterwards, to wit, on the 14th day of April, A. D. 1875, said defendants, by their attorneys, filed in said clerk's office their pleas in
14 said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

In the United States circuit court for the northern district of Illlinois, March term, 1875.

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson
vs.
GEORGE W. CAMPBELL AND LAWRENCE Proudfoot, assignees of Augustus A. Wiswall, bankrupt.
} Assumpsit.

And the defendants, by Merriam and Alexander, their attorneys, come and defend the wrong and injury, &c., and say that they did not, and that said bankrupt did not, promise in manner and form as the plaintiffs have above thereof complained against them; and of this they put themselves upon the country, &c.

And for a further plea in this behalf the defendants say actio non, because they say that the several supposed causes of action in the plaintiffs' declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not other or different causes of action; that after the making of the several promises in the said declaration mentioned, and before the commencement of this suit, to wit, at Chicago, in the county of Cook, and State of Illinois, in said dis-
15 trict, on the 25th day of December, A. D. 1871, and before the said bankrupt was adjudged bankrupt, the said bankrupt delivered to the plaintiffs, and the plaintiffs accepted of him, the said bankrupt, certain policies of insurance on a store and stock of goods of the said bankrupt burned up and destroyed by fire during the great Chicago conflagration of October 9th, 1871, and theretofore situated on Clark street, in said Chicago, to wit, of the value of six thousand dollars, in full satisfaction and discharge of the said several promises and of all sums of money in the said declaration mentioned; and this the said defendants

are to verify. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, &c.

And for a further plea in this behalf the defendants say actio non, because they say that the said supposed causes of action in the plaintiffs' declaration mentioned are one and the same, to wit, the cause of action in the first count of the said declaration mentioned, and not different causes of action; that after the making of the said promises in the said declaration mentioned, and before the commencement of this suit, and before said bankrupt was adjudged bankrupt, to wit, on the 25th day of December, 1871, at the city of Chicago, in said district, the said bankrupt, then being insolvent, agreed to turn over and deliver,
16 and did turn over and deliver, to the plaintiffs certain, to wit, five policies of insurance on a store and stock of goods on Clark street, in said city of Chicago, burned up and destroyed in the great Chicago conflagration of October 8th and 9th, 1871, theretofore owned by said bankrupt, of great value, to wit, of the value of six thousand dollars, in full satisfaction and discharge of the promises in said declaration mentioned, and of all the damages sustained by the plaintiffs by reason of the non-performance thereof, and which said policies of insurance and whatever sum or sums of money they should subsequently collect or receive thereon the plaintiffs agreed to receive, and then accepted and received, of and from the said bankrupt, in full satisfaction and discharge of the said promises and damages; and this the said defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, &c.

And for a further plea in this behalf the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that the several supposed causes of action in the plaintiffs' declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not other or different causes of action; that these de-
17 fendants are assignees in bankruptcy of Augustus A. Wiswall, bankrupt, duly adjudged such bankrupt on the 21st day of February, 1874; that said supposed cause of action is a balance claimed to be due plaintiffs on open account from said bankrupt on or before the 9th day of October, 1871, then amounting to about nineteen thousand dollars; that the plaintiffs were then the only creditors of said bankrupt; that on, to wit, the 25th day of December, 1871, at Chicago, in said district, and before said bankrupt was adjudged bankrupt as aforesaid, the said bankrupt, being indebted to the plaintiffs as aforesaid, agreed to turn over to the plaintiffs, and did turn over and deliver to the plaintiffs, his insurance policies upon a certain store and stock of goods burned up and destroyed in the conflagration of October 8th and 9th, 1871, theretofore owned by him, and situated on Clark street, in said city of Chicago, and the plaintiffs agreed to receive the same, and did receive and accept said policies of insurance, and whatever sum or sums they should thereafter collect upon or on account of the same, in full compromise settlement, satisfaction, and discharge of all indebtedness at that time due and owing to them by said bankrupt, including said account, and thereafter stated, admitted, and represented to various firms in the boot and shoe trade, to the trade, and to the public, and caused and authorized the said bankrupt to state and
18 represent to the trade and the public for the purpose of enabling said bankrupt to acquire credit with dealers in boots and shoes, and to buy goods of the trade on credit, that they, the said plaintiffs, had received the insurance policies of the said bankrupt in full satisfaction and discharge of all said bankrupt's indebtedness to them, whereby

and by means whereof the said bankrupt did acquire credit, and was enabled to purchase of his subsequent creditors on credit the goods and merchandise the avails whereof now constitute the entire estate of said bankrupt, which came to the hands of these defendants as assignees as aforesaid, and said subsequent creditors of said bankrupt were induced to sell, and did sell, said bankrupt goods and merchandise on credit; and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought to be admitted, contrary to their own admissions, statements, and representations, and the statements, and admissions, and representations made by said bankrupt, caused and authorized by them, to say that they did not receive the insurance policies of the said bankrupt in full satisfaction and discharge of all said bankrupt's indebtedness to them, the said plaintiffs, as aforesaid. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, &c.

19 And for a further plea in this behalf the defendants say actio non, because they say that the several supposed causes of action in the plaintiffs' declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not different causes of action; and that the plaintiffs ought not to be admitted to say that said bankrupt, before he was adjudged bankrupt, to wit, on the 1st day of December, 1871, became and was indebted to the plaintiffs in the sum of sixteen thousand four hundred and sixty nine $\frac{88}{100}$ dollars, or in any greater or lesser sum of money, in manner and form as the plaintiffs have in their said declaration alleged, because they say that said supposed cause of action is an open book account, claimed to be due plaintiffs from said bankrupt prior to the 9th day of October, 1871, then amounting to a large sum of money, to wit, the sum of nineteen thousand dollars, the said plaintiffs being at that time the only creditors of said bankrupt; that said plaintiffs on, to wit, the 1st day of January, 1872, at Chicago, in said district, and at other times and places, both before and after the time last hereinbefore mentioned, fraudulently concealed the existence of said indebtedness, and fraudulently represented, admitted, and stated, and collusively authorized and procured said bankrupt to represent to various persons engaged in the boot and shoe trade, and to

20 the public that said indebtedness had been before that time compromised, settled, and extinguished, for the purpose of enabling said bankrupt to obtain credit from the persons to whom such representations were made, and from persons engaged in the boot and shoe trade, and from the public, and that the said bankrupt did obtain credit by means of said fraudulent concealment of their said debt by the said plaintiffs and by means of such fraudulent representations and admissions and statements made and authorized to be made by said plaintiffs acting collusively with said bankrupt, to which said bankrupt was not entitled, and in fraud of the subsequent creditors of said bankrupt, and in fraud of the provisions of the bankrupt act, and this the defendants are ready to verify. Wherefore they pray judgment, if the plaintiffs ought to be admitted, against their own fraudulent concealment of said debt and their own fraudulent representations, admissions, and statements that said debt had been before that time compromised, settled, and extinguished, to say that said debt is now due and owing to them the said plaintiffs, and unpaid by said bankrupt, and if the plaintiffs ought to have their aforesaid action against them, &c.

MERRIAM AND ALEXANDER,
Their Attorneys.

21 (Endorsed:) Filed April 14, 1875. Wm. H. Bradley, clk.

And afterwards, to wit, on the 21st day of April, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDfoot, assignees, &c.
} In appeal.

On motion of the said assignees, by their attorney, the plaintiffs herein are hereby ruled to file in ten days a copy of the account sued on in this cause.

Afterwards, to wit, on the 18th day of January, A. D. 1876, in the December term, A. D. 1875, of said court, in the records of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDfoot, assignee', &c.
} In bankruptcy.

22 Now come the parties, by their attorneys, and, on motion of plaintiffs, by their attorney, upon affidavit filed, it is ordered that the trial of this cause be postponed ten days, at the end of which time the defendants are to be entitled to a peremptory trial; and on motion of the defendants, by their attorney, the plaintiffs are hereby ruled to file with the clerk of this court the books of account they rely upon, with proper references to the same, and accompanied by affidavit showing that they are the only books in their possession relative to said suit.

Afterwards, to wit, on the 9th day of February, A. D. 1876, said plaintiffs, by their attorneys, filed in said clerk's office their replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the northern district of Illinois.

CHARLES E. WISWALL, CHARLES G. NAZRO, AND John Q. Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDfoot, assignees, &c.

And the said plaintiffs as to the plea of the said defendants by them first above pleaded, and whereof they have put themselves upon the country, doth the like.

And the said plaintiffs as to the said pleas of the said defendants by them secondly, thirdly, fourthly, and fifthly above pleaded, say that
23 they the said plaintiffs by reason of anything by the said defend-

ants in those pleas alleged ought not to be barred from having and maintaining their aforesaid action thereof against the said defendants, because they say that the said defendants at the said times, when, &c., of his own wrong, and without the causes in these pleas allged or any of them, broke his several promises in manner and form as the plaintiffs have above thereof complained against him, and this the plaintiffs pray may be enquired of by the country, &c.

McCLELLAN AND HODGES,
Attys. for Plffs.

(Endorsed:) Filed Feb. 9, '76. Wm. H. Bradley, clk.

And on the same day, to wit, the 9th day of February, A. D. 1876, in the December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Thomas Drummond, judge, is the following, to wit:

CHARLES E. WISWALL, CHARLES G. NAZRO, AND John Q Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDfoot, assignees of Augustus A. Wiswall, bankrupt.

24 Now come the parties, by their attorneys, and upon issue joined, thereupon come a jury of good and lawful men, to wit, Albert Gillespie, Aaron L. Burns, Charles V. Bayley, Sinclair Hill, James Herrington, P. F. Scanlan, C. M. Hammond, J. O. Anthony, Joseph Robinson, J. W. Stewart, Edward Hall, and S. E. Cleveland, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 10th day of February, A. D. 1876, in the said December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CHARLES E. WISWALL ET AL.
vs.
GEORGE W. CAMPBELL ET AL., ASSIGNEES, &C., } In appeal.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 11th day of February, A. D. 1876, in the said December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Thomas
25 Drummond, judge, is the following entry, to wit:

CHARLES E. WISWALL ET AL.
vs.
GEORGE W. CAMPBELL ET AL., ASSIGNEES, &C.

Now come again the parties, by their attorneys, and now come also

the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and the arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short time the jury returned into court the following verdict, to wit: We, the jury, find the issue for the defendants; and thereupon the plaintiffs by their attorney move the court for a new trial herein.

Afterwards, to wit, on the 19th day of February, A. D. 1876, in the said December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE Proudfoot, assignees of Augustus A. Wiswall, bankrupt.

26 The court having considered and being now fully advised, upon the motion of the plaintiffs, heretofore entered herein for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the order of the district court rejecting the claim of said plaintiffs against the estate of said Augustus A. Wiswall be affirmed, and that the defendants be discharged and go hence without day, and that they have and recover of the plaintiffs their costs and charges in this behalf expended, together with their cost in the district court, amounting to the sum of and cents, and that they have execution therefor; and it is ordered that this be certified to the district court.

And on the same day, to wit, the 19th day of February, A. D. 1876, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the northern district of Illinois, to the December term, A. D. 1875.

CHARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDfoot, assignees of A. A. Wiswall.

27 The plaintiffs claimed in this case that they had sold and delivered to the bankrupt, during the years 1870 and 1871, and prior to the 9th day of October, 1871, a quantity of goods, amounting to nearly twenty thousand dollars, a portion of which only had been paid for by the bankrupt before the commencement of proceedings in bankruptcy, and that a balance of about sixteen thousand dollars was due at the time of the commencement of proceedings in bankruptcy.

Defendants claimed on their part—

First. That the goods were delivered to the bankrupt merely as the agent of plaintiffs.

Second. That if they were not so delivered, whatever claim plaintiffs had for said goods had been settled and satisfied by bankrupt's turning over to plaintiffs certain polices of insurance, amounting to some thirteen thousand dollars, which had been received by plaintiffs in satisfaction of any claim that might exist.

Third. That plaintiffs had been estopped by certain representations made by them to certain persons who had subsequently become creditors of the bankrupt, and sold him goods on the faith of such representations.

Fourth. That the transactions which took place between plaintiffs and bankrupt were fraululent and collusive, and made for the purpose of absorbing bankrupt's assets.

28

These several defences were controverted by plaintiffs.

On the trial evidence was introduced tending to prove these various claims and defences.

After the plaintiffs had closed their testimony, the defendants, to maintain the issue on their part, offered certain depositions, which contained declarations alleged to have been made by the bankrupt to the deponents, who were also creditors, as aforesaid, of the bankrupt, and which statements by the bankrupt were to the following effect:

The deponent had a conversation with the bankrupt during the year 1872, no other person being present, concerning the pecuniary condition of the bankrupt and his liabilities, in which bankrupt stated that plaintiffs' claim was settled by bankrupt's transferring to plaintiffs his policies of insurance.

These depositions having been read without objection at the trial in the district court, were admitted by the court (under objection of counsel, which was overruled by the court, to which ruling plaintiffs then and there excepted) under the following circumstances:

That bankrupt had been introduced by plaintiffs as a witness to testify before the jury and to prove the account, and on cross-examination had been interrogated as to the matters referred to in the depositions and as to whether he had made the statements referred to therein, and this part of the several depositions was offered by the defendants and allowed to go to the jury for the purpose of impeaching or affecting the testimony of the witness.

29

The court instructed the jury generally upon the law of the case, and upon the question of agency instructed the jury substantially as follows:

That if they believed from the evdence that the bankrupt was merely the agent of the plaintiffs in disposing of their stock of goods, and that they were not actually sold by the plaintiffs and bought by the bankrupt, then plaintiffs cannot recover.

It is claimed that at one time the plaintiffs and the bankrupt entered into an agreement that if the bankrupt would turn over to the plaintiffs certain policies of insurance on stock that had been destroyed by fire, they would release him from further liability on the demand made in this case.

It was competent for the parties to make such a contract, and it is for you to say whether or not the indebtedness has been released or discharged in that way. If the policies or claims upon them were turned over to the plaintiffs in pursuance of such agreement, the result or what they might realize is immaterial.

30

It is said that the monies due upon one or more of these policies were

collected from the insurance companies, and that, with the consent of the plaintiffs, bankrupt retained nineteen hundred dollars thereof. How that may be is immaterial, so far as the accord and satisfaction is concerned, provided the plaintiffs, or any one of them, constituted bankrupt an agent for the collection of such money.

Upon the question of estoppel the court instructed the jury substantially as follows:

Independent of what has been heretofore stated, it is said that the bankrupt and his brother, and his brother's partners, one or more of them, have acted in such a way that, as against these claims represented by the assignees, it is inequitable they should insist upon the enforcement of the claim against the bankrupt's estate. That also depends upon facts which it is for you to determine.

There can be no doubt of this being a salutary rule. For example, if under the circumstances, such as exist in this case, the bankrupt made any representation as to his condition, connected with this
31 claim of his brother's firm against him, although it might have been contrary to the fact, yet, if stated by him to another party having no knowledge of the truth, and that other party relied and acted upon it, and furnished the bankrupt goods on the statement, it would not be competent for the bankrupt, however the fact might be, to say, nor for any of the partners, if such a statement were made by them, to say the statement was not true.

To apply it to this case. It is said that the bankrupt and his brother, and one of the brother's partners, made such representations as were calculated to influence and did influence some of the creditors of the bankrupt to sell him goods, and that if it had not been for the assertion thus made as to the bankrupt's condition, and particularly with reference to and in connection with this claim now set up by the plaintiffs against him, goods would not have been furnished bankrupt by these various creditors, and therefore it is inequitable under such circumstances for the plaintiffs to insist on this claim. If the fact were as stated that would be true. These representations must, of course, be connected with the firm of Wiswall, Nazro and Thompson, the plaintiffs, as it is they who are to be affected by such representations, and any representations of the bankrupt must of course be connected
32 with them in some way in order to affect them before this principle would operate. In other words, the estoppel, as it is called, must operate upon the plaintiffs themselves.

To the giving of each of said instructions and each proposition thereo the plaintiff' then and there excepted.

Thereupon the jury gave their verdict against the plaintiffs and for the defendant. Whereupon the counsel for plaintiffs filed the following motion for a new trial, to wit:

Circuit court of the United States for the northern district of Illinois.

HARLES E. WISWALL, CHARLES G. NAZRO, and John Q. Thompson,
vs.
GEORGE W. CAMPBELL AND LAWRENCE Proudfoot.

And now come the plaintiffs, by their attorneys, and move the cou to set aside the verdict rendered, and to grant a new trial in this caus

And for grounds of *his* motion the plaintiffs show to the court t ollowing, to wit:

1. The court admitted improper evidence offered by the defendant, that is to say, the testimony of Charles E. Wiswall, John Q. Thompson, James M. Burt, George A. McLellan, Charles F. Hennan, William M. R.
33 Vose, Charles J. Bishop, and H. C. Robinson.

2. The court erred in giving to the jury the first, second, and third instructions given by the court.

3. The verdict is contrary to law and the evidence in the cause.

McCLELLAN, HODGES AND CUMMINS,
Attys. for Plaintiff.

(Endorsed:) Filed February 19, 1876. Wm. H. Bradley, clerk.

But the court overruled said motion, and gave judgment upon the said verdict of the said jury against the plaintiffs, to which the plaintiffs then and there excepted.

And inasmuch as the matters aforesaid do not appear of record, the counsel for the plaintiffs present this bill of exceptions, and pray that the same may be signed and sealed by the court, and made a part of the record in said cause.

And it is done accordingly.

THOMAS DRUMMOND.

(Endorsed:) Filed February 19, A. D. 1876. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 24th day of March, A. D. 1876
34 the said plaintiffs, by their attorneys, filed in said clerk's office their supersedeas-bond in said entitled cause, which said bond is in the words and figures following, to wit:

Supersedeas-bond.

Supreme Court of the United States.

CHARLES E. WISWALL, CHARLES G. NAZRO, and JOHN Q. THOMPSON,
vs.
GEORGE W. CAMPBELL AND LAWRENCE PROUDFOOT, assignees in bankruptcy of the estate and effects of Augustus A. Wiswall, bankrupt.

Know all men by these presents that we, Charles E. Wiswall and Lothrop S. Hodges, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto George W. Campbell and Lawrence Proudfoot, of the city of Chicago, in the county of Cook and State of Illinois, in the sum of three thousand dollars, to be paid to the said George W. Campbell and Lawrence Proudfoot, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this twenty-third day of March, A. D. 1876.

35 Whereas the above-named Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois, seventh circuit, in favor of the said defendants and against the said plaintiffs, and for costs:

Now, therefore, the condition of this obligation is such that if the

above-named Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson shall prosecute their said writ of error to effect and answer all costs and damages, including just damages for delay, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES E. WISWALL. [SEAL.]
LOTHROP S. HODGES. [SEAL.]

Sealed and delivered in presence of.

I approve this bond under protest, not admitting that it is a case for a writ of error.
March 24, '76.

THOMAS DRUMMOND.

(Endorsed:) Filed March 24, 1876, at 11 o'clock a. m. Wm. H. Bradley, clerk.

36 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Charles E. Wiswall et al. are the plaintiffs and George W. Campbell et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 12th day of October, A. D. 1876, and of our Independence the one hundred and first year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

37 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, plaintiffs, and George W. Campbell and Lawrence Proudfoot, assignees in bankruptcy of the estate and effects of Augustus A. Wiswall, bankrupt, defendants, a manifest error hath happened, to the great damage of the said Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, as by their complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100th year.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Supreme Court of the United States. Charles E. Wiswall et al. vs. George W. Campbell et al. Writ of error.

38 UNITED STATES OF AMERICA, *ss:*

To George W. Campbell and Lawrence Proudfoot, assignees in bankruptcy of the estate and effects of Augustus A. Wiswall, bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, judge of the circuit court of the United States for the northern district of Illinois and seventh circuit, this 24th day of March, in the year one thousand eight hundred and seventy-six.

I sign this citation under protest, not admtting it is a case for a writ of error.

THOMAS DRUMMOND.

39 We admit due service of the within citation upon us this 25th day of March, 1876.

MERRIAM & ALEXANDER,
Attys. for Assignees.

(Indorsed:) Supreme Court of the United States. Charles E. Wiswall et al. vs. George W. Campbell et al., assignees, etc. Citation. McClellan & Cummins, attys. for plffs. in error.

(Indorsement on cover:) No. 895. Charles E. Wiswall, Charles G. Nazro, and John Q. Thompson, plffs. in error, vs. George W. Campbell & Lawrence Proudfoot, assignees of the estate of Augustus A. Wiswall, a bankrupt. N. Illinois C. C. U. S. Filed 23 October, 1876.

IN THE

UNITED STATES

SUPREME COURT,

October Term, A.D. 1876.

CHARLES E. WISWALL,
CHARLES C. NAZRO,
JOHN Q. THOMPSON,
Plaintiffs in Error,
vs
GEORGE W. CAMPBELL,
LAWRENCE PROUDFOOT,
Assignees in Bankruptcy of the estate and effects of Augustus A. Wiswall, Bankrupt,
Defendants in Error.

Error to the United States Circuit Court for the Northern District of Ills.

Motion by Defendants in Error to dismiss the Writ of Error.

BRIEF and ARGUMENT for Defendants in Error on motion to dismiss

LAWRENCE PROUDFOOT,
Attorney for Defendants in Error.

MERRIAM & ALEXANDER, *of Counsel.*

CHICAGO.
W. R. Alexander, Printer, 84 La Salle Street.
1876.

IN THE

UNITED STATES

SUPREME COURT,

October Term, A.D. 1876.

CHARLES E. WISWALL, **CHARLES G. NAZRO,** **JOHN Q. THOMPSON,** *Plaintiffs in Error,* *vs* **GEORGE W. CAMPBELL,** **LAWRENCE PROUDFOOT,** *Assignees in Bankruptcy of the estate and effects of Augustus A. Wiswall, Bankrupt,* *Defendants in Error.*	*Error to the United States Circuit Court for the Northern District of Ills.* *Motion by Defendants in Error to dismiss the Writ of Error.*

BRIEF and ARGUMENT for Defendants in Error on motion to dismiss.

It is contended by the defendants in error, on behalf of the *bona fide* creditors of the bankrupt estate, that the claim which is the subject of this controversy, was filed by the plaintiffs in error against the bankrupt estate represented by them, under a collusive arrangement between the bankrupt and his brother, Charles E. Wiswall, one of the plaintiffs in error, and is wholly fraudulent. As the matter has been twice heard and decided by competent tribunals, against its validity, plaintiffs in error can have very little expectation of succeeding in establishing this claim; and we are justified in assuming that the writ of error in this cause, is prosecuted quite as much with the view of creating delay in the distribution of the assets of the bankrupt's estate, and in that way

punishing the *bona fide* creditors for objecting to being robbed by plaintiffs in error of more than half of the proceeds of the property furnished by them to the bankrupt, not sequestered by him previous to his bankruptcy, as for any more commendable purpose. Such a case, of itself, would present a strong argument in favor of so construing the provisions of the bankrupt law, as to defeat so unworthy a purpose, if there was any latitude for construction; and if construction were allowable in a law so perspicuously drawn as the provisions of that law relating to this question of jurisdiction.

The clearly manifested intent of Congress in framing the bankrupt act, was to provide for the most expeditious distribution of the property of an insolvent among his creditors, consistent with a due regard to the rights of all parties claiming an interest therein.

In a case like this, of opposition by an assignee to the allowance of a claim against the estate of a bankrupt, it provides in substance: 1*st*. That the matter may be determined by a Register, if neither party objects; 2*nd*. That either party may have the finding of the Register reviewed by the District Court; and 3*d*. That either party may appeal from the decision of the District Court to the Circuit Court of the same District, and may then have a jury trial, where "the final judgment * * * shall be conclusive." Here, certainly, are all necessary safeguards to the rights of the parties, yet capable of such immediate application, as not to be seriously inconsistent with the design of the act to secure a prompt distribution of the bankrupt estate. The Congress that enacted the bankrupt law, was by no means ignorant of the inevitable delay in the settlement of bankrupt estates which would result from conferring jurisdiction in such cases upon the Supreme Court, and wisely determined that business men, after suffering the delay necessarily incident to the prosecution of a claim through the different stages deemed by them necessary, and provided for in the act, should not be compell-

ed to wait from two to four years longer, for a revision of the judgment of the Appellate Circuit Court, by this Court, before a distribution of the estate should be had. The idea of retaining the money of a business man, without interest, in some designated depository for such a time, is so monstrously inconsistent with the recognized purpose of the act, that nothing short of unmistakable language, manifesting an unmistakable intention, can justify a conclusion inflicting such hardships. A claim against the assignee of a bankrupt estate, is a creation of the bankrupt act; the manner in which the claim shall be prosecuted, is expressly provided in the act; and the limit to which it can be prosecuted, is fixed by the act. While it is true, that Section 691 of the Revised Statutes provides that "all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, * * may be re-examined and revised or affirmed in the Supreme Court upon writ of error;" and also that section 4980 of the Revised Statutes provides that "any supposed creditor whose claim is wholly or in part rejected, * * * may appeal from the decision of the District Court to the Circuit Court for the same district," we insist that these provisions do not confer jurisdiction upon this Court in this special class of cases. It is well settled law, that a writ of error to the Circuit Court, will not lie to review a final judgment under a law conferring a *new and special jurisdiction*, unless expressly authorized by the law.

U. S. v. *Nourse*, 6 Peters 470, 493.

The judgment sought to be reviewed in this case was rendered under a law conferring a new and special jurisdiction upon the Circuit Court.

And not only is no jurisdiction in reivew conferred upon this Court therein, but the law expressly provides—Section 4985 of Revised Statutes—that "the final judgment of the Circuit Court rendered upon any appeal provided for in the preceeding section, (4984. in relation to the taking and pro

secution of appeals) shall be conclusive."

There can be no conflict between the provisions of Sections 691 and 4985, because Section 691 has no application.

When the provisions of a special statute like the bankrupt act, are variant from a general statute in existence at the time it is passed, both will stand together, except so far as the statute last enacted is repugnant to the other. To that extent the general statute will be modified by the special statute. This must necessarily be so, otherwise a complete and symmetrical law might be deprived of its vitality, and rendered an absurdity, by the inconsistent or conflicting provisions of other laws not considered, or known by the legislature to be existing. In the case now under consideration, Section 4985 modifies Section 691, to the extent of withdrawing the two classes of cases for which appeals are provided in previous sections of the bankrupt act, from the decisions of the District Court to the Circuit Court, from the general jurisdiction conferred upon this court by section 691, in other like cases. This question has been decided by this court, (and in broader terms than we are contending for, because the distinction between general and special statutes is not made,) in the *United States* v. *Tynen*, 11 Wallace 92, where, in delivering the opinion of the court, Field J. says:—"When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy, as a repeal of the first."

In *Henderson's Tobacco*, 11 Wallace 657, Strong J. says:—"This is always the rule where the provisions of the latter act are repugnant to those of the former, so far as they are repugnant. * * * But it must be observed that the doctrine asserts no more than that the former statute is repealed, *so far* as the provisions of the subsequent

statutes are repugnant to it, or *so far* as the latter statute, making new provision, *is plainly intended as a substitute for it.*"

To the same effect, and as to particular statutes, and their construction with reference to the subject matter, see,

Dwarris on Statutes (2d Eng. Ed.) 514, 533, 580 and 719.

We are not aware that the first question of jurisdiction raised by this motion, has been directly decided by this Court. We believe it has been generally conceeded that the judgment of the Circuit Court was final in the case of an, appeal either by the creditor or assignee, from the allowance or rejection of a claim; and the Court will observe, that in this case the bill of exceptions is signed, and the bond approved, by Judge Drummond under protest. We apprehend the reason of this to be, that no lawyer has heretofore been found with sufficient hardihood to attempt to prosecute a writ of error, in the face af an express statutory provision that the judgment of the Court sought to be reviewed should be conclusive.

It is true, this Court, in the case of *Coit v. Robinson,* 19 Wallace 284, intimates the opinion, that doubts are entertained whether such cases are re-examinable, but expresses no opinion as the question was not in issue.

In the case of *Morgan v. Thornhill.*, 11 Wallace 77, this Court did express a positive and unqualified opinion, and say, "it is certain that neither the creditor nor the assignee can appeal to this Court from the decree of the Circuit Court in such a case, as the express enactment is that the final judgment of the Court, shall be conclusive, and that the list of debts shall, if necessary, be altered to conform thereto." And fortify that conclusion by saying—"Confirmation of that view is also derived from the succeeding clause of the twenty-fourth section of the act, (4985, R. S.) which provides that the prevailing party shall be entitled to costs, and that the costs, if they are recovered against the assignee, shall be allowed out of the estate of the bankrupt."

The decision in *Morgan v. Thornhill* also very clearly shows that no jurisdiction is conferred upon this Court in this case by section 4939, of the Revised Statutes. It limits (pages 75 and 76.) the cases which may be removed into this Court for re-examination by writ of error, to cases provided for by section 4979 of the Revised Statutes, wherein the Circuit Courts and District Courts are vested with *concurrent* jurisdiction. In the case at bar, it is clear no concurrent jurisdiction exists, as the only manner in which a case of this kind can come before the Circuit Court, is on an *appeal* from the decision of the District Court, wholly or in part rejecting a claim; while all cases provided for in section 4979, of which this Court takes jurisdiction, if commenced in the District Court, and suits at law—and no pretence will be made that this is a proceeding in equity—must be brought before the Circuit Court by *writ of error*. The real distinction clearly is, that a regular suit, either at law or in equity, either "by the assignee against any person claiming an adverse interest, or by such person against such assignee," whether originally brought in the District Court and transferred to the Circuit Court by writ of error, or brought in the Circuit Court, and which has in that Court proceeded to final judgment or decree, wherein the sum or value in controversy exceeds five thousand dollars, may be reviewed in this Court by writ of error or appeal under section 4989, and that such is the real limitation of the jurisdiction of this Court in all proceedings by or against assignees under the bankrupt act.

In regard to the second question of jurisdiction raised by this motion, we insist that the same rule as to the ascertainment of the sum or value in dispute in this case should be applied, as was early established by this court, in cases in ejectment, &c.—that when the amount in dispute does not from the nature of the case, appear from a full record of the proceedings, it may be shown by affidavits.

In the case of *Williamson*, v. *Kincaid*, 4 Dallas 20, which appears to have been a suit relating to a dower interest in 300 acres of land, the value of which did not appear upon the record, and in the case of *Course* v. *Stead*, *Ibid*. 22, which was a proceeding in equity wherein the matter in controversy was a tract of land, the Court in both instances permitted the value of the matter in dispute to be shown by affidavits on ten days notice. In the last case DALLAS J. says: "The value of the property in dispute, must be its actual value, for the purpose of jurisdiction." We have assumed, in this case, that the Court would consider an affidavit showing the value of the matter in dispute, served upon the defendants over twenty days before the day fixed for the hearing of this motion, as affording all, or greater benefit to the plaintiffs in error, than the method of procuring the affidavits adopted in the cases referred to. In fact, the case of *Richmond* v. *The City of Milwaukee*, 21 Howard 392, seems to discourage the practice of giving time to file affidavits of value, and to indicate the course pursued in this case as the proper one. The affidavit of George W. Campbell, filed in support of this motion, shows that the entire assets of the estate of the bankrupt, after deducting expenses already paid, are $6,857.24; that claims to the amount of $15,623.53, have been proved up and allowed against it, and that if the entire amount claimed by plaintiffs in error, should be allowed and added to the amount already allowed and payable, the entire sum they would be entitled to recover as a dividend, would be less than the sum of $3,520, not sufficient to give this court jurisdiction. That this is the sum or value in dispute, is evident. It is the largest sum plaintiffs in error can be entitled to recover under any circumstances. That the amount proved as a claim is not the measure of value, is evident, because no execution can be awarded against the assignees, and the only effect of a judgment in favor of plaintiffs in error, would be to require the list of debts to be altered to conform thereto. This change in the

list of debts would simply entitle them to a proportionate amount of the assets of the estate. That is all they can get from the assignees, or in this proceeding. The balance of the claim stands to be disposed of by other provisions of the law, if the bankrupt is discharged, if not, it remains a valid debt against him personally. The absurdity of regarding the amount of the claim as a measure of value, will appear by supposing the amount of the estate to be less than five thousand dollars in this case. In that event the entire sum for distribution among all the creditors, would be less than is required to give this court jurisdiction; yet the amount of the claim would be the same.

It is held in *De Kreft* v. *Barney*, 2 Black 714, that to give this court jurisdiction "the matter in dispute must be money, or *some right*, the value of which could be calculated and ascertained in money."

Here the matter in dispute is a right to participate in the distribution of a bankrupt's estate, the value of which has been calculated and ascertained to be less than $3520.

In *Lee* v. *Watson*, 1 Wallace 339, the Court say;—"The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled in the body of the declaration."

Here the plaintiffs in error only pray to be admitted to participate in the distribution of the bankrupt's estate, to the proportinate amount of $16,469.68; the recovery sought, being simply the amount they would be entitled to in such distribution.

In the case of *Stinson* v. *Dousman*, 20 Howard 461, the exact converse of the proposition we are contending for, was held by the court. In that case, suit was instituted to recover $481, but incidentally the effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, a tract of land valued at $8000, and the Court held that it had jurisdiction.

In *Hagan* v. *Foison*, 10 Peters 160, the Court held that the penalty of a bond of larger amount than $2000, does not fix the jurisdiction; and that the burden of proving the value in dispute to be sufficient to give the court jurisdiction, is upon the party seeking to obtain a revision of the case.

In *Pratt* v. *Fitzhugh*, 1 Black 273, the Court say with regard to the "sum or value." "This has always been held to mean a property value, and without the fact of value being shown by the record, or by evidence *aliunde*, the court has no jurisdiction."

The record in the case at bar does not show one dollar of property value to be in dispute. It does not show that the assignees have, or ever will have a dollar to distribute; and therefore, upon the face of the record it appears, without reference to the affidavit of Campbell, that the court has no jurisdiction.

In *Montgomery* v *Anderson*, 21 Howard 386, a point similar to this was raised, but not decided. In that case, a judgment *in rem* for $2,034, against a fund in court amounting to $26,250, was sought to be reviewed; but the case was dismissed because there had been no final decree of distribution before the appeal was taken from the District Court to the Circuit Court.

In the *Columbian Ins. Co.* v. *Wheelright*, 7 Wheaton 534, which was a peremptory mandamus to admit the defendants in error to the offices of directors of the Ins. Co., the plaintiffs in error were permitted to produce affidavits as to the value of the matter in controversy, which was held to be ascertained by the salary; but it appearing to be less than the jurisdictional sum required, the court directed the writ of error to be quashed.

The conclusion to be deduced from all the authorities we have examined, is, that the actual sum or value in dispute is the test of jurisdiction; that in certain cases, in suits between

individuals, where a judgment may be rendered and execution issued on the judgment, the sum named in the declaration is regarded as the sum or value in dispute, as when a judgment is rendered for the defendant, and perhaps in other cases; but when the final judgment is for a thing, or for a right of unascertained value, as in this case, the amount claimed confers no jurisdiction, but the sum or value in dispute must be shown *aliunde* to be sufficient to confer jurisdiction; the burden of showing which, devolves upon the party seeking to review the judgment or decree.

Respectfully submitted,

J. W. Merriam,
Of Counsel.

LAWRENCE PROUDFOOT,
Attorney for Defts. in Error.

.....Agenda No.....

UNITED STATES

SUPREME COURT.

OCTOBER TERM, A. D. 1876.

Error from the Circuit Court for the Northern District of Illinois.

CHARLES E. WISWALL, *et al.*
Plaintiffs in Error.

vs.

GEORGE W. CAMPBELL, *et al.*
Defendants in Error.

BRIEF & ARGUMENT.

For Defendants in Error.

Filed the ..... *day of*

..... *A. D. 1876*

..... *Clerk*

LAWRENCE PROUDFOOT,
Attorney for Defts. in Error.
Merriam & Alexander, of Counsel.

W. R. Alexander, Printer, 84 & 86 La Salle Street

Supreme Court of the United States

OCTOBER TERM, A. D. 1876.

CHARLES E. WISWALL, CHARLES G. NAZRO, JOHN Q. THOMPSON,
Plaintiffs in Error,
vs.
GEORGE W. CAMPBELL, LAWRENCE PROUDFOOT, ASSIGNEES IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF AUGUSTUS A. WISWALL, BANKRUPT.

Error to the Circuit Court for the Northern District of Illinois.

Brief on Behalf of Plaintiffs in Error,

IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

JOHN H. THOMPSON,
J. J. McCLELLAN & A. B. CUMMINS,
Attorneys for Plaintiffs in Error.

CHICAGO:
JAMESON & MORSE, PRINTERS, 162 AND 164 CLARK STREET.
1876.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

CHARLES E. WISWALL, CHARLES G. NAZRO, JOHN Q. THOMPSON,
Plaintiffs in Error,
vs.
GEORGE W. CAMPBELL, LAWRENCE PROUDFOOT, ASSIGNEES IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF AUGUSTUS A. WISWALL, BANKRUPT.

Error to the Circuit Court for the Northern District of Illinois.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR,

IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

The facts of this case are as follows: The plaintiffs in error, during the years 1870 and 1871, and prior to Oct. 9, 1871, sold and delivered to Augustus A. Wiswall, goods upon credit, to the amount of $16,469.58. The said Augustus A. Wiswall, on the 21st day of February, 1874, was adjudged bankrupt by the District Court of the United States for the Northern District of Illinois, upon the petition of certain of his creditors, filed the 15th day of January, 1874, and the defendants in error were appointed his assignees in bankruptcy. The plaintiffs in error claim that the said Augustus, at the time of the commencement of said proceedings in bankruptcy, was still indebted to them in said sum of $16,469.58, for the goods so sold and delivered,

and proved their claim in said bankruptcy proceedings. The defendants in error, as such assignees, prayed for a re-examination of said claim before the Register; and the issue made thereon was certified to the said District Court for decision. The District Court wholly disallowed the claim, and the plaintiffs in error appealed from the decision of the District Court to the Circuit Court of the same district, which appeal was taken under sections 4980 and 4984 R. S. U. S., and the cause was conducted in the said Circuit Court as an action at law in conformity with the provisions of said last mentioned section. At the December term of said Circuit Court for the year 1875, the cause was tried by a jury, who brought in a verdict for the defendants in error, on which judgment was rendered in favor of said defendants, and thereupon the plaintiffs in error sued out their writ of error from this court to the said Circuit Court, to reverse said judgment.

The defendants in error now move this court to dismiss the writ of error for want of jurisdiction, alleging as the ground of such motion, that the said judgment is not reviewable by writ of error or otherwise, and further that the matter in dispute does not exceed the sum of $5,000.

We recognize distinctly the rule so often laid down by this court, that the judgments and decrees of the Circuit Court, in the exercise of its supervisory jurisdiction in bankruptcy, under section 4986, R. S. U. S., are not subject to re-examination or review in this court.

Clearly this is not a judgment rendered in the exercise of such supervisory power. It was not a case to be heard and determined by the Circuit Court "as in a court of equity," nor could it have been heard in vacation. On the other hand, it has all the characteristics, and was tried and determined as an action at law—and necessarily in term time. It was brought into the Circuit Court under sections 4980 and 4984, R. S. U. S., which sections constitute a special provision for appeals from the decisions of the District Court in this class of cases, and therefore the supervisory jurisdiction is expressly excluded. There-

fore former decisions of this court touching its jurisdiction in appeals from judgments of the Circuit Courts, in the exercise of their supervisory power, have no application.

The question in the case at bar has, it is believed, never before been presented for the decision of this court. Whatever weight might have been given to the language of this court in *Morgan* vs. *Thornhill*, 11 Wall., pp. 76–77, is fairly overcome by its opinion expressed in the later case of *Coit* vs. *Robinson*, 19 Wall., p. 284, and the court expressly say in these cases that the question here involved was not presented for its decision.

The general statute relating to this jurisdiction of this court, expressly refers to the class of cases to which the case at bar belongs (R. S. U. S., § 691), namely, "all final judgments of any Circuit Court, in civil actions removed there from any district court by appeal or writ of error."

Section 4989 R. S. U. S., (section 9, of the Bankrupt Act of 1867), affirms or at least implies, that the jurisdiction of this court obtains in all actions at law and suits in equity, arising out of or connected with proceedings in bankruptcy where the matter in dispute is of the requisite value. The later statute of Feb. 16, 1875, is amendatory of the last mentioned section, as well as section 691, in respect to the value of the matters in controversy.

It is insisted that section 4985 expressly precludes the appellate jurisdiction of this court. This section reads as follows:

"The final judgment of the Circuit Court rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee they shall be allowed out of the estate."

It is claimed that the words declaring the judgment conclusive have the effect of prohibiting any review or re-examination of the judgment referred to. It is submitted that the words used will not bear that construction. The word conclusive in legal parlance, as applied to judgments, has a well settled, definite meaning. All judgments of courts of competent jurisdiction are conclusive until set aside or reversed, and the fact that they are liable to be vacated or reversed does not render them any the less conclusive while they remain in force. The quality of conclusiveness relates wholly to their effect between the parties while so in force, without regard to their being subject to re-examination by appeal or writ of error. The word conclusive, as used in the statute, is a mere pleonasm, declaratory of the legal effect of the judgment. Without it the judgment would still be conclusive. It must be presumed that Congress used the word in its ordinary legal signification. It is believed that no instance can be found in any reported case, text book or treatise, where the word conclusive, as applied to judgments, is used in any other sense than that above stated. A familiar example of the use of this word is found in Greenleaf's Evidence, Vol. 1, § 523, as follows:

"But to give the full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally *concluded* by the same proceedings." * * * * *

"And wherever this identity is found to exist, all are alike *concluded*." * * * * * *

"Hence all privies whether in estate, in blood or law, are estopped from litigating that which is *conclusive* upon him with whom they are in privity."

And again in sec. 524, same vol., "Both the litigants must be alike *concluded* or the proceedings can not be set up as *conclusive* upon either."

And further in sec. 525, speaking of the effect of judgments in rem.—"These decisions are binding and *conclusive* not only upon the parties litigating in the cause, but upon all others." See also Id. § 526 to 536 inclusive.

By which it appears that the word conclusive in no sense means not appealable, not reviewable, not subject to re-examination—but in every instance is merely descriptive of the effect of the judgment upon the parties while unreversed, and in no manner relates to the remedy a party may have by appeal, writ of error or other remedial process.

But it is insisted on the part of the defendants in error that the construction which deprives the plaintiffs in error of the right to have the judgment in this cause reviewed by this court, is supported by the policy of the bankrupt law, requiring a speedy settlement of all matters in controversy, relating to the estate of the bankrupt. This argument loses all its force when it is considered that all other actions at law and all suits in equity relating to the estate of the bankrupt, may be brought to this court on writ of error or appeal—where the matter in controversy is of the requisite value—suits brought by the assignee to recover debts due to the bankrupt, or to recover property conveyed by the bankrupt in violation of the bankrupt law, in short, all actions at law or suits in equity brought by or against the assignee, are within the appellate jurisdiction of this court, provided the amount in dispute is of sufficient value. This court has entertained jurisdiction in a large number of cases belonging to this class.

The whole estate of the bankrupt may be the subject of litigation between the assignee and adverse claimants, and in such case either may have his appeal to this court, and there is no fair ground for discriminating against a creditor who prosecutes a cause of action at law against the assignee by depriving him of his writ of error. The delay consequent upon appeal by a creditor to this court would be no greater than in the case of an adverse claimant of the whole or part of the estate in bankruptcy. To hold that the debtor of the bankrupt, when sued by the assignee, may bring his cause to the court by writ of error

or appeal, and that the creditor of the bankrupt who sues the assignee, has no such right, is to impute to Congress a mere idle caprice, a fanciful, groundless discrimination, which neither reason nor policy of the law nor the plain reading of the statute sustains.

In the case of the *Insurance Company* vs. *Comstock*, 16 Wall., p. 268, the fact that the judgment sought to be renewed was founded on the verdict of a jury was considered by this court as a very important circumstance in determining the appellate jurisdiction of the Circuit Court by writ of error. And the reasoning of the court in that case, p. 268, is of great force when applied to this case.

"Congress, it must be assumed, in conceding to the debtor the right to demand a trial of the issue by a jury, intended to confer a right of some value, which would be converted into a mockery if the judge presiding over the trial, may exclude, by his rulings, all the evidence which he offers, to disprove the charges set forth in the petition, and he, the debtor, be left without any power to resort to an appellate tribunal to correct the errors committed by the bankrupt court."

It is further alleged in support of the motion that the matter in dispute is only of the value of $3,520.00. This position is based upon the assumption that the whole estate in bankruptcy has been converted into money, and that the distributive share of the plaintiffs in error would be the sum above named, and no more, should they recover the full amount of their demand; and that therefore the value of the matter in dispute is such distributive share. If it were absolutely certain, which it is not, that no more property or effects will be discovered or realized by the assignees than the funds now in hand, and that none of the debts alleged to have been proved and allowed will be disallowed and rejected as they may be, the position would still be untenable. In order to realize the said sum of $3,520, the plaintiffs in error must recover the full sum of $16,469.58, the amount claimed. This is the matter in dispute.

The statute, § 691, R. S. U. S., and the amendment of Feb. 16, 1875, contemplates two classes of cases—one in which the plaintiffs

claim a certain sum of money as damages, or otherwise, as the case may be; in this class the sum claimed in the declaration or bill is the matter in the dispute. The other class embraces all cases involving property rights having no fixed standard of value. In the latter class the requisite value must be shown by the record or *aliunde*.

The case at bar belongs to the former class. The plaintiff's declaration in the Circuit Court was substantially a common law declaration, the defendants pleaded to it as such. Damages are claimed in the sum of $16,469.58. The extent to which the judgment may be satisfied is another matter, and is not in controversy in this suit.

The damages claimed in the declaration is the sum in dispute, where the plaintiff in error was the plaintiff below. It is hardly necessary to cite authorities in support of this proposition. The cases of *Walker* vs. *United States*, 4 Wall., 163, and *Wilson* vs. *Daniel*, 3 D., 407–408, are in point.

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